IN THE

Supreme Court of the United States

October Term, 1976

76-1530

HARRY LEVINE BENSON,

Petitioner,

—against —

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Harry Levine Benson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals is reported (*United States* v. *Benson*, 548 F.2d 42 (2d Cir. 1977)) and is reproduced as Appendix A. The Court of Appeals denial of Benson's petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 6, 1977. A timely petition for rehearing and

suggestion for rehearing *en banc* was denied on March 4, 1977. Mr. Justice Blackmun extended the time for filing the instant petition for a writ of certiorari until and including May 3, 1977 by an order dated April 5, 1977 (Appendix C *infra*) .

Questions Presented

1. Whether the government's proof was insufficient to jurisdictionally bring petitioner's conduct within the activities proscribed in Counts Two and Three of the indictment.

2. Whether the court erred in denying petitioner's motion for a judgment of acquittal on the grounds that Buhler was not the lawful owner or possessor of the diamond and emerald.

3. Whether the court's refusal to grant the petitioner's request for a one-week adjournment of the trial was a gross abuse of the court's discretion.

4. Whether the Court's refusal to grant the petitioner's request for a continuance during the trial was a denial of his Fifth Amendment right to due process of law.

5. Whether the court denied petitioner his constitutional right to compulsory process for obtaining witnesses and documents.

6. Whether the court erred in failing to charge, as requested, on the negative inferences that can be drawn from false testimony.

Statement

Harry Levine Benson was tried and convicted by court and a jury in the United States District Court for the Southern District of New York. On August 25, 1976 judgment was entered (Tenney, J.) upon petitioner's conviction of conspiracy to violate Title 18, United States Code, Sections 1343 and 2314 (18 U.S.C. 371), utilizing wire communications in interstate and foreign commerce to transmit messages in execution of a fraudulent scheme (18 U.S.C. 1343) and inducing another to travel in interstate and foreign commerce in execution of a fraudulent scheme (18 U.S.C. 2314). The petitioner was committed to the care and custody of the attorney general on counts one and two for a period of three (3) years with the sentences to run concurrently. The execution of sentence on Counts one and two was suspended and the petitioner was placed on probation for three (3) years. On Count three the petitioner was sentenced to the care and custody of the attorney general for a period of four (4) years to be served consecutively to the sentence conspiring to violate 18 U.S.C. 1343 and 2314. The petitioner and the two other named defendants (Herbert Kaminsky and Mari-Ann Danise) were charged in Counts II and III of the indictment with violating the wire fraud and travel provisions of Sections 1343 and 2314 of Title 18, United States Code, respectively.

The conspiracy allegedly began on or about December 23, 1974 and continued up to the filing of the indictment on June 5, 1975. Counts II and III were committed on or about December 23, 1974.

Pre-Trial Hearing

The petitioner was arraigned on May 7, 1976 before the court and was directed by the court to obtain counsel by the following Monday, May 10th. On Monday the petitioner appeared before the court with counsel (H2)*, who requested that the court adjourn the scheduled starting date of the trial from May 24 to June 1st to give counsel sufficient time to interview and investigate the government's principal witnesses, some of whom were foreign nationals, residing overseas. The request was denied (H3-4).

A hearing was held on May 18, 1976 at the request of petitioner's counsel, and the government agreed to make Hans Buhler, a Swiss national, available for an interview with defense counsel (B7-10).** The interview was conducted on May 20, 1976 in the office of the assistant United States Attorney, but Buhler declined to be interviewed. Counsel for the petitioner wrote to the court on May 21, 1976 requesting a continuance. Counsel stated that although he had engaged the services of an attorney and private investigator in Switzerland, no material had been received from either one of them, and an investigation of Hans Buhler was essential to the preparation of his defense, which was an attack on Buhler's credibility. Moreover, government reports indicated that there were pending cases in Switzerland against Buhler and this information only became available to petitioner's counsel on May 20, 1976.*** The request for a continuance was denied (11).****

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* Numerals in parenthesis preceded by the letter "H" refer to the Hearing of May 10, 1976.

** Numerals in parenthesis preceded by the letter "B" refer to the minutes of the hearing of May 18, 1976.

*** (A-60).

**** Numerals in parenthesis refer to the pages of the trial transcript.

Trial

On the morning of May 24, 1976, prior to the selection of a jury, defense counsel renewed their application for a continuance. Counsel argued that the document produced by the government on May 20th referred to several pending criminal cases involving Buhler and these could well have a bearing on his credibility which was of great importance to the defence and necessitated the granting of a continuance (6, 7-12, 13).* Petitioner's counsel argued that having received this information on the 20th, there was insufficient time to allow him to try and obtain the materials referred to therein (15-19). Petitioner's request for a continuance again was denied (25).

The Prosecution's Case

Robert Crowningshield, a gemologist and Director of the New York office of the Gemological Institute of America (G.I.A.) was the first witness for the government (93). The Gemological Institute is an educational institution composed of jewelers that "grades" diamonds by establishing the color, cut, clarity, weight, dimensions and identifying characteristics of the stone (94). Crowningshield testified that Hans Buhler, the principal government witness, is a client of G.I.A., and on June 14, 1974 Buhler brought a diamond to the Institute (95, 97, 98, 102). The stone was returned to Buhler who several days later, on the 17th of June, returned with the diamond and it weighed 9.88 karats (98, 100).

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* The document produced by the prosecutor on May 20, 1976 was prepared by the Swiss Police and refer to Buhler as "a shady character" (A-63).

Government's exhibit two in evidence (100) was a receipt issued by G.I.A. to Hans Buhler for the grading of the diamond in June, 1974. Government's exhibit three in evidence (100, 101) was a photograph of a 9.88 karat diamond taken in June, 1974.

Crowningshield testified that the quality of the diamond was unusual in that it was internally flawless with a color grade "F", which is colorless but not as transparent as color grades "D" or "E" (102).*

On cross-examination Crowningshield said when he saw the diamond for the second time on June 17, 1974, it was internally flawless with a "very, very slight tint of yellow", recognizable only to a diamond grader (102, 103). The diamond, being internally flawless and over five karats in weight, was of uncommon weight (103, 106). In January, 1975 Crowningshield notified the Federal Bureau of Investigation (F.B.I.) that an internally flawless diamond of similar weight, dimensions and grade to the stone that Buhler had in June, 1974 (105, 108, 110, 115) had been brought to G.I.A. for examination.

Hans Buhler, a self-assured, twice-convicted embezzler and forger, was the government's principal witness (209-211). Buhler, a Swiss national, residing in Zurich, Switzerland, originally told the F.B.I. that his only prior conviction had been for driving without a muffler, and that he had never been to prison, but in truth he had been convicted of embezzlement twice, once in October, 1965 and while on probation for this offense he was again convicted of embezzlement in September, 1969 and sent to prison (209-11, 216, 218). Upon securing his release

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* The Gemological Institute of America has an arbitrary color grading system from colorless which is "D" to "Z" which is the beginning of a canary yellow color.

from prison Buhler's talents led him into the jewelry business where, as a graduated gemologist working for Green Fire Trust, his own company, he engaged in the buying and selling of precious stones (118). Buhler had another business, the Gem Research and Gemological Institute, where he did appraisals and research on precious stones and jewelry (118-19).

In June, 1974, Buhler and his partner, H. Nat, bought a 9.90 karat diamond from a private client through a retail store in Zurich, Barth's Jewelers, one of the largest jewelry stores in Zurich (119-21, 401, 402).

Government's four in evidence was a receipt from the bank at Weiss for a cashier's check in the amount of 510,000 Swiss Francs, bearing Buhler's handwriting and the name "Barth" written on it (121). In October, 1974 Buhler testified he bought an emerald on consignment from Kothari Brothers in Bombay, India (122). Government's five in evidence was the receipt printed in German which Buhler had for an 8.34 karat emerald (123, 338-39).

In December, 1974 Buhler left Zurich and traveled to Los Angeles, California with an 8.35 karat emerald and a 9.88 karat diamond (123).

Government's exhibit six in evidence was an export declaration filed by the witness with the Swiss government (125).

Government's exhibit seven was Buhler's plane ticket from Zurich to London to Los Angeles (125).

Government's exhibit eight in evidence over objection was a receipt from the Gemological Institute of America in Los Angeles for a 9.88 karat diamond "E" color made out to a Kalmun von Czazy (126). Buhler described

van Czazy as a friend of his who accompanied him to G.I.A. in Los Angeles (126). Government's exhibit eight referred to an "E" grade diamond, whereas the diamond examined in New York was an "F" grade (126, 127).

On December 22, 1974 Buhler flew from Los Angeles to New York. Government's exhibit nine in evidence was Buhler's boarding pass from Los Angeles to New York (127, 129).

Government's exhibit ten in evidence was Buhler's hotel bill from the Hotel Beverly in New York City (129).

Buhler received a call from Hans Furer in Switzerland on December 23, 1974 while in New York who gave Buhler a phone number here in New York City. Buhler called and asked to speak to Mari-Ann Danise, who told him to come up when he told her he had the diamond to present (129-32). Buhler went to Danise's office where he met Mari-Ann Danise who introduced him to "Herbie" an individual for whom he was not given a last name, who was the defendant Herbert Kaminsky, neither of whom he had ever met before (132, 376-77, 328). Buhler and "Herbie" went into a side office alone and "Herbie" asked him "Did you bring over the diamond" (133). Buhler said no, that he would not bring a stone like that to someone he did not know. "Herbie" said, according to Buhler, that he was a serious business person and if Buhler wanted to do business he would have to take the rules from him. "Herbie" also identified Mari-Ann Danise as a tremendously rich woman, very well-known in the textile business, who owned the tenth and eleventh floors on 39th Street (133).

Buhler presented Kaminsky with the 9.88 karat diamond and the certificate from G.I.A., but prior to presenting the stone and the certificate, Buhler phoned Zurich and spoke to Furer, his broker, about presenting

the stones to "Herbie". Upon completing the call, Buhler presented the 9.88 karat diamond, with G.I.A. certificates from New York and Los Angeles, and an 8.35 karat emerald to "Herbie", who told Buhler he would like to take the stone to an expert and if he got the same appraisal he would present the stone to a friend within twenty minutes, although how Kaminsky could get the same appraisal with two different certificates is not known (134).

The custom in this business, according to Buhler, when someone wants to have a stone appraised here in the United States, is to ask for a receipt and then give out the stone when one is satisfied as to the other parth's credibility (135).

On direct examination Buhler testified that he spoke to Brito in Switzerland before he gave the diamond to Kaminsky, and got a receipt back from him for it, but on cross-examination Buhler admitted that this second call to Switzerland, when he spoke to Brito, was after Kaminsky had left with the diamond and he had not mentioned any names when he spoke to Brito (135-36, 451-53). Kaminsky gave Buhler a receipt that said "Good for one diamond 9.88" and his signature (137).

"Herbie" got the stone from Buhler at a price of $20,000 a karat (138). Although Buhler admitted that in January, 1975 he had told the grand jury that he first offered the diamond to Kaminsky at a price of $19,500 a karat, which was then reduced to $19,300 a karat, and finally sold to Kaminsky for $19,000 a karat (316-18). After "Herbie" left, Buhler testified that he and Mari-Ann Danise went into her office for twenty minutes, during which time a telex arrived at her office with an offer of diamonds with the prices quoted in Swiss Francs, which Buhler converted into dollars (138).

After this was completed Buhler began to inquire of Danise as to who "Herbie" was (138). Buhler, who up to this point did not evcn know or ask what "Herbie's" real name was, began to become curious about the complete identity of a man to whom he had given a diamond worth $185,000 and was told by Danise that "Herbie's" full name was Herbie Key, and he was a rich, important man, whose wife had a tremendous amount of jewelry (139). Twenty minutes later "Herbie" called and bargained with Buhler over the price of the stone, with Buhler agreeing to a price of $19,800 a carat and allow-Kaminsky additional time to show the stone to a friend of his (139-40). Kaminsky called again and stated that he had sold the stone for $22,800 a carat and was coming over with the private customer. Buhler agreed that the $3,000 a carat mark-up was "Herbie's" profit (140). "Herbie" returned and introduced the petitioner Harry Levine Benson to Buhler as a friend of President Nixon's (382). Buhler asked for the diamond, but was told by Kaminsky that he and the petitioner had put the stone into a safe, but they did not reveal the safe's location, nor did Buhler ask (142). Thus ended the only sale of a valuable gem that Buhler ever made in this country.

Buhler was informed by "Herbie" that the petitioner was the buyer of the diamond and the petitioner had his money in Chicago and Buhler would have to go to Chicago with the petitioner to pick up the money, to which surprisingly enough Buhler agreed (142). Buhler did ask for his diamond back, but "Herbie" and the petitioner repeated their earlier statement that the diamond was in a safe (143). Buhler's failure to get his money or his diamond back did not keep Buhler from agreeing to return Kaminsky's receipt and accept one from the petitioner (143).

This receipt stated that the petitioner received a 9.88 carat for $22,800 a carat and it was signed Harry Levine (143). Buhler admitted testifying before the grand jury that the petitioner was to pay $22,000 a carat, and in June, 1975 at an examination before trial he admitted testifying that the petitioner was to pay $25,000 a carat (319-21). Kaminsky stated he wanted to buy the emerald for his wife, but Buhler asked about payment for the emerald. Buhler agreed to Kaminsky's proposal that he keep Kaminsky's $30,000 profit from the sale of the diamond in payment for the emerald because Kaminsky, who he had known for several hours already, had vouched for the petitioner (144). Buhler agreed to accept payment in bills of fifty to five hundred dollar denominations because one thousand dollar bills were hard to come by (144-45). "Herbie" refused Buhler's request for a receipt for the emerald because the money was in Chicago and, on this note, Buhler departed with the petitioner (145). Although, as he admitted, he never saw Kaminsky give the diamond or the emerald to the petitioner (277).

At the airport, Buhler overheard the petitioner speaking to "Herbie" on the telephone before he and the petitioner got on the plane for Chicago (145-46). Once aboard, Buhler testified that the petitioner left his seat to make another phone call and he followed, but they both returned to the plane and flew to Chicago (146-47).

Buhler testified that he had paid for the stone on June 26, 1974 following his return from New York City after the stone was examined at G.I.A. (154-55). At the same time that he purchased the 9.88 carat diamond, Buhler testified that he had also bought a second diamond, for which he did not pay anything, which he later sold for $12,000 (155, 330).

Government's exhibit II in evidence was Buhler's plane ticket from New York to Chicago (155).

On the plane to Chicago, petitioner told Buhler that he lived in Las Vegas and gave him an address there, and stated that he was a boxing match manager (156). Buhler, at the conclusion of this conversation, wrote down the address that the petitioner had given him in Las Vegas as well as what the petitioner had said about his business activities (157). The petitioner told Buhler he was going to Las Vegas and that he never traveled with a suitcase or with a passport (161).

Government's twelve in evidence was the notes that Buhler had prepared on the flight from New York to Chicago on his conversation with the petitioner. The items were received in evidence over objection (158-59).

The petitioner told Buhler that the money would be available in the morning, that it was in a safe deposit box and a friend had the second key (159). Buhler then offered the petitioner a five carat white diamond that he had in Chicago which petitioner accepted, but Buhler stated he first wanted his $255,000 for the 9.88 carat diamond (161). The plane was two hours late arriving in Chicago and the petitioner told Buhler that because of the delay he could not get in touch with his friend who had the second key (162). Buhler and the petitioner went to a hotel and then to eat (163). Buhler testified they returned to the hotel, going to their adjoining rooms, and about 1 o'clock a.m. the petitioner left his room, returning between 3 o'clock and 4 o'clock a.m. (164).

Buhler and the petitioner had breakfast the next morning in the Hotel Continental, and the petitioner told Buhler that he could not find his friend with the second

key (165), but since Buhler would be in London for Christmas, he could get his money there. The petitioner then left for Montreal, but before departing he told Buhler that he had bought the 8.35 carat emerald from "Herbie" over the phone, and the emerald was in a safe in New York (166). The petitioner agreed to give Buhler a receipt for the two stones, a diamond and an emerald, but could not write it out because of an injury to his arm so Buhler wrote out a receipt and the petitioner signed (167-68).

Government's exhibit thirteen in evidence was the receipt prepared by Buhler and signed by the petitioner (168-70).

Buhler testified he noticed a difference between the petitioner's signature on the first and second receipts, but accepted petitioner's statement that his arm hurt and gave back the first receipt which was destroyed (171-73). Buhler was told to see Mr. Fitzsimmons at the Colony Club in London to pick up his money, but before checking out of the hotel, Buhler and the petitioner called Kaminsky and Danise in New York City (171). Buhler told Danise that the money was not in Chicago, but would be available in London, and Danise then gave the phone to "Herbie" who told Buhler to return to New York and then proceed to London (172).

Government's exhibit fourteen in evidence was Buhler's hotel bill from the Continental Plaza in Chicago (173).

In Chicago, Buhler called Zurich and spoke to Furer and Brito telling them that he could not get the money in Chicago because the plane had arrived too late (173-74). Buhler stated that he had checked out the address

and telephone number that the petitioner had given him in Las Vegas prior to departing for New York City, and he found a "Harry Levine", but at a different address (174-75). Buhler testified he then called the Tropicana Hotel and inquired about Harry Levine and was given a different address and telephone number that he placed upon government's exhibit twelve (175).

Buhler flew to New York City meeting Danise and Kaminsky at her office. Buhler threatened to go to the police but was told by Danise that she knew the petitioner for a long time and there would be a big scandal, and was told by "Herbie" that he could not do this, and that the money would be in the casino at London (176). During this conversation a telex from the petitioner arrived, and "Herbie" told Buhler not to go to the Colony Club and see Mr. Fitzsimmons, but to go to the Sportsman Club and meet the general manager and owner, Mr. David Gray, and that he and Danise would guarantee the transaction (177). Buhler flew to London on December 24, 1974 (177).

Government's exhibit fifteen in evidence was Buhler's New York to London plane ticket (177). Government's exhibit sixteen in evidence was Buhler's hotel bill from the West Lodge Park in London (178).

Buhler called David Gray and Gray denied having the authority to pay him $255,000 and described Levine as "very tall, heavy built man, who is a well-known English TV comic" (179). Buhler then called Danise in Connecticut, told her what had happened, and she told him to call back that she would take care of the situation (179, 180). Buhler testified that the petitioner then called him saying he was in London and that he would like to meet him at midnight at a pub to give him his money (180).

Buhler declined this offer, and the petitioner called Buhler again stating that he had $60,000 with him and he would pick up the rest in Rome then fly with the money to Zurich and give it to Buhler. Buhler agreed (181). Although how he expected the petitioner to get to Rome or Zurich without a passport, or a clean shirt for that matter, is not explained.

The following day Buhler spoke to James Brito and Brito's lawyer, Herbert Sachs, at the Hilton Hotel in Zurich (181), and later he called Danise and told her that the petitioner had $60,000 and wanted to bring the rest to Zurich, to which Danise agreed (181, 182). The next day Buhler called Danise in New York City and told her that the petitioner had not arrived and later she informed him that she had the money (182). Buhler and Sachs spoke to Danise from Buhler's apartment and she said she had the money and would bring it to Zurich (182).

The next day in a series of phone calls Danise said she was too scared to carry $255,000 to Switzerland, and she did not want to put it into a bank because they were closed and she did not want to take it to the airport (183). Danise declined to deposit the money with Wells Fargo or give it to Sach's law partner, Hanrahan (183).

Government's exhibit seventeen in evidence was a telex by Buhler to "Herbie" and Danise in New York City (183-85).

Danise on January 1, 1975 told Buhler that she had the money in her hands and for him to come to New York and pick it up, but that "Herbie" and he did not like the telex and he did not want to be responsible for the whole transaction (185-86).

Government's exhibit eighteen in evidence was Buhler's boarding pass to New York City (191). Buhler arrived in New York City and checked into the Waldorf Astoria (192). Government's exhibit nineteen in evidence was Buhler's bill at the Waldorf Astoria (192).

Buhler called Danise about picking up his money, but it was after 5 o'clock and she said the money was locked in the safe, but to be in her office the following morning at 9 o'clock (192). The next morning Buhler met Danise and Kaminsky at her office when the petitioner called. The petitioner said he was in Las Vegas, that he had lost $132,000, and the 9.88 carat diamond and the 8.35 carat emerald were put up with the casino to cover his losses. Buhler told the petitioner that he was sick and tired of the stories and was going to the F.B.I. and hung up (193).

Buhler then spoke to Kaminsky and Danise who told him that the petitioner was an important man and he had to protect him (193-94). Buhler then told Danise and "Herbie" that he would not leave without further guarantees, otherwise he would go to the F.B.I. (194). Kaminsky and Danise went into the next office where "Herbie" dictated a guarantee to Danise who typed it (194).

Government's exhibit twenty in evidence was the guarantee for payments from Danise (195).

The next day, January 4, 1975, Buhler went to Danise's office to pick up $50,000 as per the guarantee (196). "Herbie" and Danise were there, and the petitioner called again saying he had $60,000 in cash with him and that "Herbie" and Danise will put up $50,000 and Buhler was to put up the rest against the petitioner's

gambling losses in Las Vegas (197). Buhler told the petitioner he did not have the money, but that he would use checks he had with him. The petitioner refused the checks and "Herbie" came in with a man named Bernie Shaw who would accompany Buhler to Las Vegas carrying $50,000 (197). Buhler testified that he told Herbie that he did not have to incur an expense in sending Shaw to Las Vegas, that since he had the guarantee anyway he would carry the $50,000, but "Herbie" declined saying he had to follow the petitioner's instructions (197-98).

"Herbie" then asked Buhler if he had a client in Switzerland who would be interested in buying U. S. bonds. An objection to this evidence was overruled based on the government's offer that this evidence was being offered on the question of intent (198-99). The court then instructed the jury that the testimony as to bonds was being admitted solely as to the defendant Kaminsky and solely on the question of intent (200). Buhler testified that he asked "Herbie" if they were legitimate, but that he did not want to travel with them and would prefer a photocopy to present to his bank in Zurich. Government's exhibit twenty-one in evidence was a photocopy of Canadian bonds (201). Buhler testified that he never bought or sold any of these bonds (202).

Buhler stated that Danise ordered him a ticket for Las Vegas and gave him some cash at "Herbie's" direction (202). Buhler left and went to the F.B.I. prior to leaving for Las Vegas (203).

Government's exhibit twenty-two for identification was Buhler's plane ticket to Las Vegas (203-04).

Buhler on arriving in Las Vegas went and stayed at the home of his friend Kalman von Csazy (204-05). The petitioner called him there and arranged a meeting for

9 o'clock in the cafeteria at the Dunes Hotel, but called back and said he was in San Francisco with $60,000 to pick up the rest of the money and he would be at the Dunes Cafeteria at 11 o'clock. Buhler then hired a private investigator named Tom Miller (205).

Buhler met the petitioner at 11 o'clock the next day at the Dunes Hotel, and told him that his name was not Harry Levine, but Harry Benson, and he wanted to know where the stones were deposited. The petitioner declined saying that he would bring the stones back (206). The petitioner also said that he had sent Bernie Shaw back to New York with the $50,000 that Shaw had gotten from Danise and "Herbie", and that he did not need it anymore (207). Buhler made an appointment to see the petitioner at 1 o'clock but he did not appear (207). Buhler then called Danise informing her of petitioner's failure to keep the appointment and she said not to worry, the transaction was guaranteed and she had the money if anything went wrong (207-08). Buhler stated he went to the F.B.I. before calling Danise and after speaking to Danise he went to the Dunes Cafeteria to meet the petitioner at a meeting arranged by Danise for later that same afternoon, but the petitioner did not appear (208-09).

Buhler has also initiated a civil lawsuit against Danise, Kaminsky, the petitioner and others in the Supreme Court of the State of New York (211-12).

On cross-examination Buhler stated that he was a member of the Austrian Diplomatic Press Corps, and that he makes reports on different countries that he travels between as a member of the Diplomatic Press Corps on a special permit or passport (225-26).

Defendant's Exhibit A in evidence is Buhler's Swiss passport, vaccination certificate and membership card of the Diplomatic Press and information (227-28).

Buhler stated that he did not have the customs declaration or any other document showing that these two valuable stones entered the United States (230), and admitted that in March, 1975 he told a special agent of the F.B.I. that he could produce full documentation showing the entry of a 9.88 carat diamond and an 8.35 carat emerald into the United States, but in fact he could not (230-31).

Buhler admitted that when he first spoke to the Zurich police about this matter he did not tell them that Brito had vouched for or guaranteed the defendant Kaminsky (240).

Buhler stated that commissions on the sale of the diamond were to be split with Brito and Furer (244), and he brought the stone to this country uninsured by carrying it on his person (252). The stone was uninsured, according to Buhler, because nobody insured the stone for a half decent price, but he did not know what the insurance rates were because he never asked (252-53). Buhler admitted that in August, 1974 in Bogota, Colombia, he was robbed of $110,000 of his own money (246-53).

Buhler stated he had been dealing in diamonds in New York City for seven years, but he does not sell stones in the United States, he buys them, he is very well known in the trade here in New York City, and quite experienced in the buying of stones here in New York City (255-56). Buhler recanted his earlier statement that he had paid $185,000 for the 9.88 carat diamond by stating that he had paid that amount for two diamonds, but he changed his story again, when he admitted that he got the second

diamond *free* (259, 330). Buhler stated that the asking price for the emerald was $31,000 (260). Buhler had bought the 9.88 carat diamond and the 8.35 carat emerald for $215,000 and was selling them for $255,000 for a profit of $40,000 (261), out of which, according to Herbert Sachs, he was paying commissions of $35,000 to $40,000 (567-68), although he admitted he could have gotten a higher price for the stone in Europe, and the flights he made to the United States from Europe in June and December of 1974 cost him approximately $1,300 (265-66).

Buhler stated that between June and December of 1974 he might possibly have offered this diamond for sale to a jeweler in New York City, but he did not recall the names of any of the jewelers to whom he offered the stone (267-68).

On cross-examination Buhler stated that he had purchased the diamond from a private party through a retail shop in Zurich, but he did not remember from which particular shop (288-89). Buhler admitted, after seeking to avoid making a responsive answer (291-96), that in speaking to the Swiss police he at first declined to reveal the identity of the party who was his partner in the purchase of the 9.88 carat diamond (296). Buhler stated that he put up $92,500 of his own money toward the purchase of the diamond (297).

At trial Buhler testified that he had acted as the broker in the purchase of the Deep Dean, a 104 carat diamond, for his former father-in-law, at a price of 180,000 to 200,000 Swiss Francs, and as the broker for the buyer of the "Star of South Africa", a 47 carat diamond (314-15).

Buhler testified that between the court sessions of Tuesday, May 25, 1975 and Wednesday, May 26, 1975 he

called up the individual from whom he got the 9.88 carat diamond and a second smaller diamond, and it was a man by the name of Barth, one of the biggest jewelers in Zurich (331, 401-02).

Buhler testified that he bought an 8.35 carat emerald and a second smaller emerald in October, 1974 in India from a firm in Bombay (336), and the receipt was printed in German (338-39).

Buhler admitted that he had delivered a number of trading checks to a Kalmun von Csazy, a friend of his for 15 or 16 years. Buhler got the checks from a company named Eufra in Zurich, having received them from either Mr. Leeman or Mr. Ritz. Buhler did not pay for the checks, having received them in an envelope, and did not know how many there were. Buhler stated that he did not examine the checks to see if they were filled out, if they bore the name of a payee, or had any amount inscribed on their face. Buhler stated he never asked Leeman, Ritz, or von Csazy what it was he was carrying.

Buhler brought the checks in to the country at the request of von Csazy and he was going to bring them to him on one of his regular trips from Zurich to Las Vegas, and he brought those checks into the country in December, 1974 and delivered them to von Csazy in Las Vegas in January, 1975. Upon arriving with them in Los Angeles (339-48), Buhler flew to New York with the checks, and carried the checks with him until he returned to Zurich (347-48). Buhler stated that when he returned to the United States on January 2, 1975 he had the same trading checks with him as he had carried on his December, 1974 trip (349). Buhler offered these checks to Kaminsky to cover the petitioner's gambling losses in Las Vegas (355-56). Buhler admitted that these checks did not belong to him, that he had no financial interest in those checks

(356), and that the checks had no name on them (356-57). Buhler stated that he knew that the bank went bankrupt, but he did not know if it occurred in April, 1975 or April, 1976 (357-59).

Petitioner's exhibit C and C1 in evidence was the bank records of Buhler's Swiss bank accounts from June, 1974 through June, 1975 (361-62).

Buhler admitted that his bank records showed a debit of 105,000 Swiss francs as of December 30, 1974 (362), but he said he had a line of credit with his bank for 250,000 Swiss francs, which he did not use because immediate cash was required. Buhler stated that he did not try to get in touch with any of his associates to see if they would honor his check on January 2, 1975 because it was Christmas or New Year's Eve (362, 364), and the fact that the trading checks were not his did not matter (364).

Buhler stated that if he sold the 9.88 carat diamond his broker, Hans Furer, would be entitled to a commission of seven per cent from the profits from the sale of both the diamond and the emerald (366-68), although the commission agreement in evidence between Furer and Brito called for the payment of a $15,000 commission, split between the two of them (559, 561-62).

Buhler did not ask the defendants where they banked because he did not consider it important, and stated that it was possible that he asked people in the diamond trade here in New York City about Danise and Kaminsky, but he did not know to whom he put the question (372-73).

Buhler stated he never got a bill of sale for the diamonds that he paid cash (401).

Buhler, upon arrival in the United States with the diamond did not prepare a customs declaration, stating that when bringing in the diamond for an appraisal and

an expert's examination, no customs declaration was required (414). Buhler stated that all he did was fill out a form asking "Did you bring any valuable things with you", and he said "Yes", but he gave no details as to what the valuable thing was, and put down a much smaller value than he paid (415). Buhler stated he never got a copy of any forms from Customs (419). Buhler stated that when he flew into Los Angeles, he put a value on the "valuable things" of One Hundred Thousand ($100,000.00) Dollars (421-22).

Buhler had the G.I.A. make a complete examination of the diamond in June, 1974 and they certified the stone as an "F" color (425-27). Buhler then conducted his own tests on the stone and determined that it was an "E" color in his opinion (428). Buhler returned to the United States in December, 1974 with the diamond for the sole purpose of having the stone's color certified (432). Buhler stated he did not bring the stone back to New York because G.I.A. would give him exactly the same certificate or report (433). Buhler stated that he came to New York to buy some jewelry (440).

Defendant's exhibit G in evidence was a check made out by Danise to TWA and given to Buhler in the amount of $398 (447).

Buhler stated that he understood English quite good and if he did not understand he asked (449).

On the morning of Thursday, May 27, 1976, appellant's counsel notified the court that Barth, the jeweler who Buhler claimed had sold him a 9.88 carat diamond had been located by a private investigator and had stated to the investigator that he knew Buhler and had both bought and sold jewelry to Buhler, but that he had never sold to

Buhler a 9.8 carat diamond (484). The court stated that the statement by Barth "would be highly material, certainly, on the issue of credibility and would consider whether to grant a continuance after the government rested its case" (490, 492).

Herbert Sachs, an attorney admitted to practice in the State of New York, was the second witness for the prosecution (531). Sachs stated that he is the attorney for Mr. James Brito and in December, 1974 Brito was an officer of Chaos Limited, which was located on 39th Street between 7th and 8th Avenues (532). On December 27, 1974 Sachs flew to Zurich at the request of Brito and after speaking to Brito he called Danise in New York (533-34). Sachs testified that Danise told him that Buhler should come to the United States and he would be paid (534). Sachs told Danise that Buhler would not return to the United States and other arrangements should be made to insure that he received his money (534). On December 29, 1974 Buhler and Sachs both spoke to Danise in New York City (534). Sachs told Danise that a Mr. Hanrahan, an attorney who worked for Sachs, would be at her office on Monday to pick up approximately $250,000.00. Danise agreed (535). Sachs spoke to Danise on the morning of December 30th and inquired as to whether the money had arrived, and she stated that she had spoken to the petitioner by phone the previous evening and he told her not to give the money to Hanrahan because he did not know him (536-38). Buhler then sent a telex and following that there was a second telephone conversation between Sachs and Danise (539).

Government's exhibit twenty-three in evidence was a slip of paper in Sachs' handwriting bearing the petitioner's phone number (539).

Sachs related that he got the petitioner's phone number from Danise when Danise gave it to him to allow Buhler to speak to the petitioner directly so that Buhler could authorize the money being turned over to Hanrahan (540).

Sachs spoke to Danise again that day and it was decided that Hanrahan would pick up the money at 2 o'clock, but later Danise stated that the petitioner would not permit Hanrahan to pick up the money until a receipt he had given to Buhler was returned (541).

There was still another conversation between Danise, Sachs and Kaminsky, whereby it was agreed that Hanrahan would go to Danise's office, call Sachs, and when Sachs got the receipt, the money was to be turned over to Hanrahan. Kaminsky told Sachs that he was not involved in the transaction, that he did not want a commission, but that he would try to see that everything would be done to see that Buhler got paid (542-43).

Sachs next testified, over objection, that he got a call from a Mr. Short or Mr. Small, who identified himself as the accountant for the petitioner (544), and he told Sachs that the petitioner had asked him to call and he said the money would not be turned over to Hanrahan because the petitioner did not know him and the petitioner wanted his receipt (545).

Danise and Sachs spoke again that day and she told him she would bring the money to Zurich (545). Later Sachs spoke to an attorney named Eisenberg, representing Danise, who stated that he would not let Danise bring the money to Zurich because it was too dangerous (546). Sachs argued and Eisenberg said he would call back. He left a phone number, but when Sachs tried to reach him it was a wrong number (547).

On January 1st or 2nd of 1975, Sachs spoke to Danise and she said that Buhler should come to the United States and pick it up (547). Sachs stated that Buhler did not want to come to the United States (547), but Buhler did return to the United States (548).

Sachs stated on cross-examination he first learned about the facts in controversy in this case on December 27, 1974 in a conversation with James Brito (557).

Defendant's exhibit E in evidence was an agreement to split a $15,000 commission between Hans Furer and James Brito on the sale of a 9.88 carat diamond, dated January 1, 1975 (559, 562, 568), and Brito's share was to be between $7,500 and $10,000. Buhler told Sachs in Switzerland that the only stone that he had sold in New York City was a 9.8 carat diamond, and it was on this sale that a commission was being paid (568-69). Buhler told Sachs that the emerald had been given to Kaminsky as security for the commissions, of which Kaminsky, Ms. Danise, her husband and Brito were to get one-quarter each of the total commission (569). The sale price of the diamond was $245,000 or $255,000, according to what Buhler told Sachs.

Sachs stated that prior to his testifying in court he had never seen or spoken to the appellant (571).

Sachs testified that he arrived in Switzerland at 8 o'clock on December 27th and he met Buhler on December 28, 1974 (572). Sachs stated that as far as he knew, Buhler was supposed to go to Danise's office to discuss certain diamonds, but *not* the 9.8 carat diamond.

Sachs stated that Brito first found out about the sale of the 9.8 carat diamond from either Furer or Buhler and he got this information a few days prior to December 27th (576).

Prior to the calling of the witness Isaac Pollak, petitioner's counsel moved for a severance, which was denied (584-85).

Isaac Pollak was the third witness called by the government (586). The court instructed the jury that this witness's testimony was being admitted solely as to Kaminsky and it was being offered only on the issue of wilfullness or intent (587-88).

Pollak testified that he met a man named Liewoitz in 1969 and in May, 1975 Liewoitz introduced him to the defendant Kaminsky, who was using the name Frank Must (588-90). All three men met in the Conference of Jewel Box Stores, 580 Fifth Avenue, and the defendant Kaminsky said he was interested in diamonds (590), some for himself, some for investment, and others for resale (591).

Government's exhibit twenty-six in evidence as to Kaminsky were two diamond bracelets the witness obtained to give to Kaminsky (591-92).

Pollak received another call from Liewoitz, and he obtained additional merchandise for Kaminsky which he gave to him on May 27, 1975, in the hallway by the elevator at 277 Park Avenue (592-93).

Government's exhibit twenty-seven as to Kaminsky in evidence was a receipt signed by Liewoitz for the jewelry he gave to Kaminsky (594).

Kaminsky told Pollak he would be paid for the jewelry by May 27th or 28th, and wanted Pollak to obtain additional diamonds which he did (595).

Government's exhibit twenty-eight through thirty-two in evidence as to Kaminsky were receipts for jewelry signed by Pollak (595).

The witness met Kaminsky on May 27, 1975 again in the hallway of the building at 277 Park Avenue and gave Kaminsky the jewelry.

Government's exhibits thirty-three to thirty-five in evidence as to Kaminsky were receipts for the jewelry signed by Liewoitz (597).

On May 29, 1975 Kaminsky called Pollak and said they would meet at the Manufacturers Hanover Trust Company Bank at 57th Street and Fifth Avenue and he would make payment then. Kaminsky called at 11:30 and said there had been a change in plans, but he would call back shortly. At about 1 o'clock, Kaminsky called and told Pollak to be patient (598-99). Pollak was owed about $150,000 when Liewoitz called him on Sunday morning and offered to return part of the jewelry for $25,000 (600).

Pollak never saw Kaminsky again (600).

The motion for a continuance to secure the testimony of Barth was denied (636).

Government's exhibits in evidence thirty-six and thirty-six A are business records of the Continental Plaza Hotel (640).

Government's exhibit thirty-seven in evidence is a ticket for United Airlines flight 1929 from LaGuardia Airport to O'Hare Airport, Chicago (641).

Government's exhibit thirty-eight in evidence is an auditor's coupon that indicates the ticket was paid for in cash (641).

Government's exhibits thirty-nine, forty, and forty-one in evidence are records of the New York and New England Telephone Company, respectively (641).

The government rested its case (643).

Joseph Banda, was the only witness called by the petitioner (645). Banda is a self-employed diamond dealer who has been in the diamond business for twelve years, and a member of the Diamond Dealer's Club for six years (645-46).

Banda testified he was familiar with the customs practices and procedures in the diamond industry here in New York (646). Banda stated that the Gemological Institute of America graded stones as to color and clarity, and by stones he meant diamonds and green emeralds. Banda stated that the difference in price between two stones of the same weight and girth, one with a color rating of "E" and one with a color rating of "F" would be fifteen per cent (647).

Banda said that in his experience G.I.A. would re-examine a stone if requested at a charge of $20 per carat for the first examination and $10 per carat for the reexamination, and that G.I.A. had conducted reexaminations for him at his request. Banda stated that the most expensive stone he had ever been involved with was a stone worth One Million One Hundred Thousand ($1,100,000.00) Dollars for which he was the broker (647-48). Banda said his broker's commission was two per cent (649).

Banda stated that a memorandum is taken where he leaves a stone with a dealer to sell on consignment. A cash memorandum means that the buyer gives the seller cash for the stone which is returned when the stone is returned (649).

Banda stated that based on the customs and practices in the diamond industry in New York, if one wished to buy or examine a stone worth $200,000 it could be

done either in a vault or in the Diamond Dealer's Club (650). The custom and usage in the diamond industry would not allow the release of a stone worth $200,000 on the strength of a memorandum (650-51).

In the diamond industry here in New York, diamonds are shipped country to country by the Post Office which insures up to $10,000 and then the party's own insurance broker would provide for additional coverage if necessary (651). A stone worth $100,000 or more, if it were shipped at all, is sent bank to bank, and here in New York City, the Merchant's Bank at 62 West 47th Street handles the vast bulk of the diamonds that are shipped (652).

The insurance rates on stones shipped bank to bank is three per cent (654).

Robert Crowningshield was re-called as a witness (659). He testified that G.I.A. had done work for Mr. Banda's firm and that G.I.A. in Los Angeles had different test stones than G.I.A. in New York, but as closely matched as possible (660).

The petitioner and the defendant Kaminsky rested their cases (661).

In rebuttal, the government stipulated that Hans Buhler did not declare two precious stones upon his arrival in Los Angeles on December 12, 1974 (664).

After deliberating for one day, the jury returned its verdict finding the petitioner guilty on all three counts of the indictment.

I.

The Government's Proof Was Insufficient To Bring Petitioner's Conduct Within The Activities Proscribed In Counts II And III Of The Indictment.

The government's proof at trial, taken in the light most favorable to the government, established that there was no evidence to show that any of the activities engaged in by the petitioner or his co-defendants came within the proscriptions set forth in Count II, the Wire Fraud Statute or Count III, the Interstate Transportation of Stolen Property Statute. The Court was without jurisdiction on both of these counts and the judgment on these counts should be reversed. *United States* v. *Maze*, 414 U.S. 395, 400, 402 (1974); *United States* v. *Donahue*, 539 F.2d 1131, 1134, 1135 (8th Cir. 1976).

The evidence at trial, as to the Wire Fraud Statute, established that on December 23, 1974, Hans Buhler went to Mari-Ann Danise's place of business, where he met Danise, the defendant Herbert Kaminsky, and later the petitioner, Harry Levine Benson.

Buhler testified that before he gave the diamond with the certificate to Kaminsky on December 23, 1974, he called Switzerland and spoke to his broker, Hans Furer, and asked if he could present the stone to Herbie, the 9.88 carat diamond. Buhler then presented the diamond to Kaminsky.

The record establishes that when Buhler spoke to Furer in Switzerland after first arriving at Danise's place of business on December 23, 1974, he could not have mentioned Kaminsky to Furer, since he did not know Kaminsky's last name at the time. It was only after Kaminsky

had left with the diamond and the two certificates, according to Buhler's testimony, that he learned Kaminsky's last name. Kaminsky, prior to his departure with the 9.88 carat diamond, was the central figure in Buhler's attempts to sell the stone since, according to Buhler he had spoken only to Kaminsky about the sale of the diamond, outside of the presence and hearing of Danise, who was in another room.

After Kaminsky left with the diamond and the two certificates, Buhler then learned from Danise that Kaminsky's last name was "Key". He then made a second call to Switzerland, speaking to James Brito. This second call to Switzerland, the first one to Brito on the 23rd, was made after Kaminsky left, and in this conversation Buhler admitted that he mentioned no names to Brito.

In addition, the government's second witness, Herbert Sachs, testified that Buhler was to have gone to Danise's office to discuss certain diamonds contained in a telex, but the 9.88 carat diamond was not one of them, and that Brito only found out about the sale of the 9.88 carat diamond after it occurred. The sale of the 8.35 carat emerald was undertaken after the sale of the diamond to the petitioner by Kaminsky, and it was not discussed during any of the calls to Switzerland on the 23rd of December by Buhler. The call to Switzerland on the 23rd was not made in execution of the scheme to defraud because at the time it was made there is no evidence to show that Furer knew the person to whom the diamond was to be sold, or what particular item Buhler was proposing to sell. There is no evidence to show that Furer discussed Kaminsky, the 9.88 carat diamond or the 8.35 carat emerald with Buhler on the 23rd. The call on the 23rd to Furer in Switzerland was not made in execution of a scheme to defraud. Cf. e.g. *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973).

The calls between New York City and Switzerland after Kaminsky received the diamond and the emerald in New York City on the 23rd, were made after the scheme had been executed by the stones being taken. They were made in an effort to locate the petitioner and the money due for the stones, and were not in furtherance of the schemes execution. *United States* v. *Donahue*, 539 F.2d 1131, 1134 (8th Cir. 1976).

The Court's denial of petitioner's motion to acquit on Count II under the authority of *United States* v. *Maze*, 414 U.S. 395 (1974) was error.

Count III of the indictment accused the petitioner of violating 18 U.S.C. 2314 by charging as follows:

> "the Grand Jury further charges: From on or about the 23rd day of December, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York, HARRY LEVINE BENSON, HERBERT KAMINSKY and MARI-ANN DANISE, the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000, by means of false and fraudulent promises and representations, did induce the said Hans Buhler to travel in interstate and foreign commerce in the execution of said scheme."

The Grand Jury charged the petitioner and others with inducing Buhler to travel in interstate and foreign commerce in the execution of the scheme. The Court charged the jury that they had to find that Buhler made these trips in interstate and foreign commerce in execution of the scheme to defraud. The evidence at the trial established that Buhler was already in New York City when

he first learned of Mari-Ann Danise, and that he had parted with both the diamond and the emerald before he ever got on the plane for Chicago. The trips made by Buhler, both in this country and overseas, were not made in execution of the scheme to defraud, but were made by him in an effort to locate the petitioner and his money *after* the fraud was executed.

The record establishes that Buhler never saw the 9.88 carat diamond again after he gave it to "Herbie" to have it examined. Buhler then sold "Herbie" the emerald and it was only after he parted with both the diamond and the emerald that he went to Chicago. Buhler made several flights on and after the 23rd of December, but at best, they were made in an effort to locate the petitioner or his money and were not in execution of the scheme. The "concealment" mentioned in the statute was intended by Congress to apply only during the period which the scheme took place not to some indefinite time thereafter, which probably would render the statute too vague to be fair or constitutional. Inasmuch as the scheme was completed once the gems were turned over in New York City it is our submission that there was no travel for the purpose of "concealment" during the pendency of the scheme. The Government seemingly agrees since the indictment does not charge "concealment".

Travelling in interstate commerce in concealment of a fraud are proscribed under 18 U.S.C. 2314, but concealment *was not charged in the indictment, and it was not charged to the jury.*

The government introduced no evidence in support of the charge that Buhler had been induced to travel in interstate and foreign commerce in execution of a scheme to defraud and the failure of the government in this re-

gard to show a federal nexus deprived the court of subject matter jurisdiction on Count III and an objection to subject matter jurisdiction cannot be waived and can be raised at any time. Rule 12(b)(2) of the Federal Rules of Criminal Procedure; United States v. *Isaacs*, 493 F.2d 1124 (7th Cir. 1974).

The statute under which the accused were charged provides that inducing any person to travel in interstate commerce in the execution or concealment of a scheme to defraud shall be punishable by up to 10 years imprisonment or a fine of $10,000. The petitioner was never charged, nor was the jury instructed, that he could be convicted if the trips were made in concealment of the fraud. The evidence proved that no trips were made in execution of the scheme.

This is a classic case of the Government straining for jurisdiction and coming up empty. *United States* v. *Archer*, 486 F.2d at p. 667-68 (2d Cir. 1973).

To illustrate the confusion which occurs when jurisdiction does not flow naturally we merely need turn to opinion of the Court below where at page 2 of the Court's opinion Judge Mulligan denominates Count I of the indictment as a "Conspiracy to defraud". Conspiracy to defraud, in itself, is not a federal crime.

II.

The Court Erred In Denying Petitioner's Motion For A Judgment Of Acquittal On The Grounds That Buhler Was Not The Lawful Owner Or Possessor Of The Diamond And Emerald.

The government on its rebuttal case stipulated that Buhler did not declare two precious stones upon his arrival in Los Angeles in December, 1974. At the close of

the entire case the petitioner moved for a judgment of acquittal on the grounds that there was no proof beyond a reasonable doubt that Buhler was the true owner of the diamond and the emerald and that Congress enacted the laws under which this case was being tried to protect only the true owner and possessor. The court denied the motion for acquittal at the close of the case and again when it was renewed prior to sentence. This was error. *United States* v. *Handler*, 142 F.2d 351 (2nd Cir. 1944).

In *United States* v. *Handler*, *supra*, 142 F.2d at 353, the panel deciding the case was Circuit Judges Swan, Learned Hand and Augustus N. Hand, and the court was concerned with the Construction of the National Stolen Property Act, now encompassed in part in 18 U.S.C. 2314, which was the third count of the indictment in this case. The Court said:

> "Stealing having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprived the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin . . . In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods or securities belonging to another with the intent to deprive the owner of the rights and benefits of ownership."

The issue raised by this argument is one that rarely comes before an appellate court for review, or a District Court for decision, as witnessed by the opinion of the Circuit Court below.

The legislative history that accompanied the enactment of 18 U.S.C. 2314 sets forth in very clear, unambiguous language that it was enacted to protect "honest

citizens" from these fraudulent schemes. The Report filed by the House Committee on the Judiciary that reported favorably on that section of 18 U.S.C. 2314 under which the defendants were charged contained the following statement:

> "Each year many of our citizens are cheated by confidence men. As observed in the Attorney General's communication to the Congress, in many instances the targets of these unscrupulous criminals have been retired persons, widows and also business and professional men. These people lose large sums of money to this group of criminals. The committee is of the firm conviction that our laws must be kept at a peak level of effectiveness in order to deal with these criminals, and protect honest citizens from their operations." (A 111-14).

18 U.S.C. 2314 was enacted to ensure that our citizens are not defrauded of the product of their work, very often attained after a lifetime of struggle, and not to construct a federal umbrella to enable a thief to take his ill-gotten goods anywhere in this republic.

Congress can, within constitutional limits, regulate the commercial traffic between the various states, but there is nothing in the legislative history of 18 U.S.C. 2314 that would allow one to conclude that Congress intended to regulate the safe passage of stolen goods between the several states.

The individual or individuals that the law was designed to protect are those from whom Buhler obtained the diamond and the emerald and it is those people who will shortly be precluded from the law's protection by the embrace of an individual such as Buhler within the folds of the law. Buhler has initiated a civil suit in the Supreme Court of the State of New York against the defendants in this case and others. In that suit, Buhler

alleges that he is the legitimate owner of the diamond and emerald, and to support that suit for money damages, Buhler can point to the judgment entered in this case on August 25, 1976, where, by the government having argued to the jury that Buhler was the legitimate owner of the stones, and the defense being effectively precluded from responding by the Court's refusal to grant a continuance, Buhler could well argue that the defendants in that case are collaterally estopped from raising the issue of the legality of his possession of the stones, because it was raised and argued here in Federal Court.

The erroneous interpretation given by the lower courts to 18 U.S.C. 1343 and 2314 would make the Federal Courts a way station for thieves, who having stopped here could get their ill-gotten goods stamped with a federal stamp of approval.

2314 and 1342 of Title 18, United States Code, were not enacted to secure Buhler's possession of stolen goods. The question of the legality of Buhler's possession went beyond merely affecting his credibility and went straight to the question of whether this Court had subject matter jurisdiction.

In enacting 2314 Congress did not intend, nor did it abolish all the common-law distinctions that existed in the common law crimes of larceny. The Congress enacted a law that by its language abolished the distinctions between false representations of past facts and future facts, but the statute gives no indication of abolishing the requirement that the defrauded owner of property have

title to that property. To the contrary, the legislative history seems to indicate that the person defrauded should have title to the property taken by fraud.*

It is our submission that the Court below was mistaken when it stated in its opinion that no proof of loss was necessary in a prosecution under 18 U.S.C. 2314 and 1343 citing *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2nd Cir. 1970). The Court in that case held that:

> ". . . We believe the statute [18 U.S.C. 1341] does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful." *United States* v. *Regent Office Supply Co., supra,* 421 F.2d at 1182.

Since the Court speaks in terms of injury to the victim rather than a benefit to the perpetrator, the status of the property in the hands of the party defrauded becomes of critical importance. The only party who could be injured would be the lawful owner and possessor. A thief may suffer disappointment by being defrauded of his ill-gotten gains, but he will not suffer an injury of which the law will, or should, take notice.

This is a case where the prosecution pleaded and sought to prove that Buhler was the lawful owner of the stones. The failure of proof in this matter left the government without a critical element of the crime charged.

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* H.R. Rep. 2474, 1956 U.S. Code Cong. and Admin. News 3038.

III

The Court's Refusal To Grant The Petitioner's Request For A One-Week Adjournment Of The Trial Was A Gross Abuse Of The Court's Discretion And Constituted A Denial Of Petitioner's Sixth Amendment Right To The Effective Assistance Of Counsel And Compulsory Process To Have Witnesses In His Defense.

The petitioner, Harry Levine Benson, was arraigned on May 7, 1976. Counsel appeared for him on Monday, May 10, 1976 and requested that the Court adjourn the trial from May 24th to June 1, 1976 to allow time for the interviewing and investigating of the government's principal witnesses, including Hans Buhler, the main government witness, a Swiss national residing in Zurich, Switzerland. This request was denied (A 54)*, and the denial was a gross abuse of the court's discretion depriving the appellant of his right to a fair trial. *Stans* v. *Gagliardi*, 485 F.2d 1290 (2nd Cir. 1973); *Gavino* v. *MacMahon*, 499 F.2d 1191 (2nd Cir. 1974); *Wolfs* v. *Britton*, 509 F.2d 304 (8th Cir. 1975); *Rastelli* v. *Platt*, 534 F.2d 1011 (2nd Cir. 1976).

A hearing was held on May 18, 1976 as petitioner requested in his letter of May 13th (A 58) to compel the government to disclose its list of witnesses and make them available for interviews by opposing counsel. The court declined to compel the government to turn over a list of its witnesses, but the government, at the court's direction, agreed to make its main witness, Hans Buhler, available for an interview. Buhler appeared, accompanied by his attorney, on May 20, 1976, but declined to

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* Numerals in parenthesis preceded by the letter "A" refer to the pages of the appellant's Joint Appendix in the Court below.

be interviewed by defense counsel. The government then turned over to the defense a three-page document, prepared by the Swiss police, that it received in February, 1975 which disclosed that there were pending cases in Switzerland against Hans Buhler and he was considered "a shady character" (A 63).

Petitioner's counsel on May 20, 1976 served Buhler with a subpoena duces tecum and the required fee in an effort to complete his pre-trial preparation by May 24, 1976. The subpoena called for the production of the following items:

> "All documents, including, but not limited to, passports, visas, etc., reflecting all trips made by you across a national border between June 1st, 1974 and February 1st, 1975. All bank records, including, but not limited to bank statements and cancelled checks and bank books for the period of time from June 1st, 1974 to June 5th, 1975. All records, including, but not limited to, checks, customs declarations and appraisals for a 9.88 karat diamond and a 8.35 karat emerald. All tax returns, tax declarations and any tax forms prepared by or on behalf of Hans Buhler for any government for the calendar year 1974 and 1975." (A 62)

Buhler's response at the trial for several of the items subpoenaed was that those books were in Switzerland.

Buhler never produced his tax records for 1974 and 1975, he did not produce the cashier's check used to purchase a 9.88 carat diamond, nor did he produce customs declarations for the diamond or the emerald, or an appraisal for the emerald.

Petitioner's counsel wrote to the court on May 21st, renewing his request for a continuance stating that al-

though an attorney and a private investigator had been engaged in Switzerland, no material had been forthcoming from them to date and an attack on Buhler's credibility was the keystone of the petitioner's defense (A 60). The request was denied, and denied again when it was renewed on May 24, 1976, immediately prior to the selection of a jury.

The first response that petitioner's counsel received from his investigator in Switzerland dated May 19th was sworn to, in front of the American Consul in Zurich, on May 20, 1976, and arrived in New York City on May 22, 1976 (A 66). The report stated that Barth, a jeweler in Zurich that Buhler had identified as being the seller of the 9.88 carat diamond in an examination before trial, was on a trip abroad and would not be back in Zurich until Tuesday, May 25, 1976. The delay in obtaining this first report was due to the failure of the government to even make Buhler's address in Switzerland available until May 18, 1976. Barth, a Swiss national, was unavailable to be interviewed prior to trial and appellant's counsel was unaware of what his knowledge concerning the facts of the case would be, and so informed the court on the morning of May 25, 1976.

Buhler testified that he had purchased the 9.88 carat diamond from a private client through a retail shop in Zurich. After making a phone call on the night of May 25th-May 26th, 1976, Buhler returned to the stand stating that he had spoken to the party from whom he had got the 9.88 carat diamond, a jeweler named Barth, whom he described as one of the biggest jewelers in Zurich. On Thursday morning, May 27th, petitioner's counsel told the court that the jeweler Barth had been interviewed by his investigator in Zurich. On Thursday morning, May 27th, petitioner's counsel told the court

that the jeweler Barth had been interviewed by his investigator in Zurich and denied Buhler's version of the acquisition of the diamond. Barth told the investigator that he knew Buhler and that he bought from and sold jewelry to Buhler, but he had never sold Buhler a 9.88 carat diamond, worth 500,000 Swiss francs.

Barth's proposed testimony was placed in an affidavit of petitioner's counsel and submitted to the court the next day (A 74). The motion for a continuance to depose Barth in Switzerland was taken under consideration by the court. The court stated that Barth's testimony would be highly material, certainly on the issue of credibility.

Petitioner's counsel sought to point out to the court that Barth's proposed testimony should be considered by the court, not only on the question of Buhler's credibility but, coupled with the absence of any United States Customs declarations for the diamond and emerald, Barth's testimony would also have a bearing on the legitimacy of Buhler's possession. The court rejected the latter contention, as did the government, stating that you could still steal smuggled goods. Indeed the government argued to the jury in summation as it had in its opening that Buhler was the legitimate owner of the stones. Barth's testimony was crucial to the defense, not only on the issue of Buhler's credibility, but also on the questions of whether Buhler was the lawful owner of the diamond, and his testimony would have unquestionably entitled the defense to their requested instruction under *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952) (A 117).

The court, after listening to the testimony of Herbert Sachs and Isaac Pollak, denied petitioner's motion for a continuance to obtain the testimony of the jeweler Barth.

The court, following its earlier ruling that Barth's testimony would only have a bearing on Buhler's credibility, considering Buhler's credibility no longer to be an issue because Barth's proposed testimony was not inconsistent with Buhler's.

The record before the court establishes beyond doubt that Buhler was referring to Barth as the seller of the diamond, when he testified to his acquisition of the diamond. Buhler identified Barth as the seller of the diamond in an interview with the F.B.I. in March, 1975 (A 13), in his examination before trial in June, 1975, and again on direct examination at the trial. Indeed, the government introduced into evidence Buhler's receipt for a cashier's check that he drew on his bank in Zurich in June, 1974 to pay for two diamonds, one 9.90 carat diamond* and a smaller diamond, and in Buhler's handwriting the name "Barth" was written across the front (A 132). The court's proper function at this point was "only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible." *United States* v. *Schipani*, 289 F. Supp. 43, 56 (E.D.N.Y. 1968), aff'd. 414 F.2d 1262 (2nd Cir. 1969).

The credibility of a witness is not a function of the court, but of a properly instructed jury and the court usurped this function of the jury when it denied petitioner's request for a continuance to depose Barth. *Morgan* v. *United States*, 298 U.S. 468, 481 (1936); *United States ex rel. Graham* v. *Mancusi*, 457 F.2d 463, 468-69 (2nd

* The 9.88 carat diamond was reduced from 9.90 carats by being cut and polished here in New York in June, 1974 while in Buhler's possession.

Cir. 1972); *United States* v. *Taylor*, 464 F.2d 240 (2nd Cir. 1972); *Hoffa* v. *United States*, 385 U.S. 293, 311, 312 (1966); *United States* v. *Weinstein*, 452 F.2d 704, 714 (2nd Cir. 1971). The conviction of the petitioner rests on the credibility of a witness, Buhler, who has had his credibility called into question by the proposed testimony of Barth. The jury had to decide who to believe, but they did not have the advantage of Barth's crucial testimony to assist them in their deliberations, through no fault of the petitioner.* It is well recognized that "the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Giglio* v. *United States*, 405 U.S. 150 (1972); *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2nd Cir. 1975).

The sworn affidavit of petitioner's investigator dated May 28, 1976 did not arrive in New York City until 5 p.m. on June 1st, 1976 and petitioner's counsel received it and had it translated into English the next day (A 75-81). The jury began their deliberations on June 1st in the late afternoon. The sworn affidavit detailed the investigator's interview with Barth on Wednesday, May 26, 1976 in which Barth stated:

> "I know Mr. Hans Heinrich Buhler very well, as I have had business connections with him over a long period of time. However it is I who buy precious stones from Mr. Buhler and not the other way around. It sometimes happens that a customer appears at my store—but not often—with

* No proof of flight or concealment was introduced by the government at the trial against the petitioner in spite of our court's acceptance of such proof on the question of guilt. *United States* v. *Lobo*, 516 F.2d 883 (2d Cir. 1975); 2 Wigmore, *Evidence*, § 276.

> a diamond or other jewel to sell or which he wants to trade. On such occasions I communicated with Mr. Buhler and asked him whether he was interested in the purchase of an offered stone and through me Mr. Buhler repeatedly made use of such opportunity and bought a stone. These prices fluctuated between about 10,000 francs and 30,000 francs, but in no case higher."

The government, in both its opening and summation, laid great stress upon the fact that Hans Buhler was the lawful owner of the 9.88 carat diamond and the emerald. The defense was unable to respond to this claim by the prosecution because of the court's refusal to grant a continuance to secure the testimony of Barth. It may well have been that if the jury had heard Barth's testimony, they would have concluded that Buhler was not the legitimate owner of the stones and would have acquitted, it being well settled that a jury may return a verdict that is "the voice of the country against the possibly excessive zeal of prosecutors". *United States* v. *Maybury*, 274 F.2d 899, 903 (2nd Cir. 1960).

The petitioner requested that the court charge the jury under the rule of *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952). This the court declined to do. Had the petitioner the opportunity to obtain the testimony of the jeweler Barth, then clearly the requested instruction would have had to be given for them, in addition to Buhler's failure to declare the stones in Los Angeles, there was more than sufficient evidence to support a negative inference from false testimony, if such proof be needed. *United States* v. *Jenkins*, 510 F.2d 495, 499 (2d Cir. 1975).

Barth's testimony was both relevant and material to the defense, and the failure to have it available for the trial was not due to the lack of diligence of petitioner's

counsel, but rather to Barth's absence from Switzerland, and the failure of the court to grant the requested one-week continuance.

In this proceeding, the witnesses and the evidence were not readily available, being in Switzerland, and were not available until after the trial was scheduled to start on May 24, 1976. The issues in the case were confused and the motion for a continuance was made to the court as soon as counsel appeared in the case two weeks prior to trial.

In *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964), Mr. Justice White, in writing for the court, stated:

> "The matter of continuance is traditionally within the discretion of the Trial Judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel . . . contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."

At the conclusion of the trial, the court granted counsel's request to reserve all motions until the day of sentence. In an effort to resolve all questions concerning the materiality of the jeweler Barth's testimony, petitioner's counsel moved for an order to take Barth's deposition in Switzerland, setting forth in his affidavit that Barth was willing to be deposed, and Barth's deposition would then be available to the court and counsel in passing upon the petitioner's motion for judgment of acquittal for failure to grant a one-week continuance. The government opposed the motion and the court denied it finding that the testimony was not material, and there was no proof that Barth was willing to be deposed.

A foreign national can be deposed in an American Embassy overseas before a consul or vice-consul, and that such steps should have been taken to determine exactly what Barth's testimony would be and to insure that his testimony would be available for a new trial. *United States* v. *Mosca*, 475 F.2d 1052 (2nd Cir. 1973).

This case should be ordered back to the district court for the gross abuse of discretion in failing to grant the petitioner a one-week adjournment in the start of the trial.

IV.

The Court's Refusal To Grant The Petitioner's Request For A Continuance During The Trial Was A Denial Of His Fifth Amendment Right To Due Process Of Law.

On May 26th, 1976, Buhler testified on cross-examination that during the night of May 25th-May 26th, 1976, he had called Switzerland and spoken to the party from whom he had bought the 9.88 carat diamond, a jeweler named Barth in Zurich, Switzerland, whom he described as being one of the biggest jewelers in Zurich. On Thursday, May 27th, 1976 petitioner's counsel informed the court that he had received a call from his investigator in Switzerland. The jeweler Barth had been interviewed in Zurich and stated that he had not sold a 9.88 carat diamond to Buhler, although he admitted knowing Buhler and having bought diamonds from him and sold diamonds to him. The court denied petitioner's request for a continuance to depose Barth, a Swiss national residing in Zurich. This was error. *United States* v. *Gonzalez*, 488 F.2d 833, 838-39 (2d Cir. 1973); *Washington* v. *Texas*, 388 U.S. 14, 22 (1967).

The testimony of Barth was relevant and material on the question of not only Buhler's credibility, but on the legality of Buhler's possession of the 9.88 carat diamond and on the negative inferences that can be drawn from false testimony. The government, in both its opening and closing remarks to the jury, stated that Buhler was the legitimate owner of the diamond and emerald, and having thus injected the issue into the case by stating:

> "Those were Mr. Buhler's stones . . . and the government will prove beyond any question that he was the *legitimate* owner of those two very valuable jewels . . . ."

The question as to who, in fact, is the true owner of the diamond and the emerald goes to a material element of the crimes charged. The indictment in all three counts charged that:

> ". . . the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000.00 . . . ."

The grand jury charged and the government argued that the two stones were the property of Hans Buhler. When the government, in rebuttal, stipulated that Buhler had not declared the diamond and the emerald when he entered the United States at Los Angeles, California in December, 1974, the petitioner moved for a directed verdict of acquittal on the grounds that 18 U.S.C. 1343 and 2314 only protects the possession of the true owner or rightful possessor.

The reason for pleading and proving that the property rightfully belonged to Hans Buhler serves to protect the accused from being placed twice in jeopardy for the same offense. If the proof that petitioner sought to introduce

at trial, namely the testimony of Barth, the jeweler in Zurich, that he did not sell a 9.8 carat diamond to Buhler, had been available, by deposition or otherwise, the defense not only could have introduced it on the issue of credibility and variance, but on the material question as to who legally owned the stones. *United States* v. *Alessio*, 439 F.2d 803 (1st Cir. 1971). The dilemma faced by the accused is that, whether acquitted or convicted of the crimes charged in the present indictment, he could then be charged for the same or closely related crimes under 18 U.S.C. 2314 and 2315, based on the complaint of the rightful owner. *United States* v. *Cioffi*, 487 F.2d 492, 498 (2nd Cir. 1973).

The trial court erred in considering the issue of the rightful ownership of the two stones as being limited to whether the defendants claimed to be the rightful owners. The issue of the real owner deals not with the claims of the accused, but with the scope of the law charged as set forth by Congress and with the protection of the rights of the accused not to be placed twice in jeopardy for the same offense.

The issue as to who was the real owner or rightful possessor of the diamond and the emerald had to be proven by the prosecutor to be Hans Buhler or there would be a material variance between the pleadings and the proof, and their case would fail. When the government introduced evidence on this point, the defense was entitled to introduce evidence to rebut the government's evidence.

In *Washington* v. *Texas*, 388 U.S. 14, 19, 22 (1967), then Chief Justice Warren wrote:

> ". . . The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the

> right to present the defendant's version of the facts as well as the prosecution's to the Jury so it may decide where the truth lies. Just as an accused had the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own defense. This right is a fundamental element of due process of law . . . the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the Jury or by the Court . . .".

V.

The Court Denied A Petitioner His Constitutional Right To Compulsory Process For Obtaining Witnesses And Documents.

Petitioner's counsel, after notifying the trial court of Barth's proposed testimony, commented to the court that this testimony should be considered together with the absence of any customs declarations for the stones. The court stated:

> "I was wondering why the government did not produce that. I would think it would be available to the government."

The government responded by stating that it had made an effort to get the documents,* and that the defense could

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* The government, although it filed its notice of readiness for trial in August, 1975 did not attempt to obtain the customs declaration until May 20th or 21st, 1976.

subpoena the documents. On May 27, 1976 the petitioner issued a subpoena duces tecum to obtain the customs declarations filed by Buhler in June and December, 1974 at New York City and Los Angeles, California, and the file maintained by United States Customs on Hans Buhler. The court quashed the subpoena. This was error. *Faretta* v. *California*, 422 U.S. 806 (1975); *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951); *Campbell* v. *United States*, 365 U.S. 85 (1961).

Petitioner's counsel served a subpoena duces tecum upon the United States Customs Service on May 27, 1976 (A 87). The subpoena was addressed to:

> "J. Sollazzo
> Room P S
> Building 80, John F. Kennedy International Airport
> Jamaica, Queens"

and it called upon him to produce the following items:

> "the file maintained by your agency on Hans Heinrich Buhler, D.O.B. 11/11/35, Swiss National, residing at Engimattstr 22, 8002 Zurich W/M. Copies of any declarations to customs made by Hans Heinrich Buhler upon entering the United States in June, 1974 at John F. Kennedy International Airport and on December 11/12, 1974 at Los Angeles, California."

On May 28, 1976, in a conference in the Robing Room, Petitioner's counsel told the court that he had issued a subpoena to Mr. Sollazzo of the Customs Service, who was the individual in charge of valuable gems at John F. Kennedy International Airport. Petitioner's counsel reported that the individual, Sollazzo, was in Florida and would be there for a while, so the subpoena was served on

Mr. Baris of the Customs Service at the World Trade Center in Manhattan. Baris told Petitioner's investigator that there was a file on Buhler and that inquiries about it had been made by the Government and Mr. Winard, Mr. Buhler's lawyer. The Customs Service, in the person of Mr. Baris, would not reveal any information as to customs declarations. In response to counsel's statement the government stated that it had information that a check of customs indicated that a short form customs declaration with Buhler's name and address had been filed in Los Angeles, but no statement of importation of jewelry or anything of value was made (A 109).* The government offered to stipulate to this, but declined to enter into any stipulation concerning the existence or non-existence of a customs declaration for June, 1974 in New York City. The court, on its own motion, quashed petitioner's subpoena for the United States Customs Service's file on Hans Buhler, without acceding to the request of both the government and the petitioner to examine the file, the existence of which was conceded by the government, in camera before ruling.

The court, one day earlier, in referring to Buhler's testimony, stated that Buhler's being a smuggler would have a bearing on the witness's credibility and moral background. The documents sought were relevant to the issues on trial, even crucial to the issues on trial, and could and should have been obtained from the government without undue delay. *Campbell* v. *United States*, *supra*, 365 U.S. at 96 (1961); *United States* v. *Dwyer*, 539 F.2d 924, 927-

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* On August 25, 1976, at the request of petitioner, a copy of the short form customs declaration was provided to the defendants. The declaration bore a date of birth of March 22, 1909, and an investigation in Switzerland revealed that this document had been prepared by Hans Buhler, Sr., the father of the witness, who denied being in the United States in December, 1974 (A. 115).

28 (2nd Cir. 1976). Petitioner's request to the court to examine in camera the Customs file on Buhler before ruling on petitioner's subpoena to determine if it contained material related to the testimony of Buhler set forth the proper approach for the court to pursue. *Palermo* v. *United States*, 360 U.S. 343, 354 (1959). The failure to obtain Buhler's customs declarations prior to trial cannot be attributed to the petitioner, but properly rests with the government to whom the documents belong, and is charged by law with their possession and safeguarding. The petitioner was not required to accept, and did not accept, the government's stipulation as to the believed-to-be Buhler customs declaration of December, 1974. *Parr* v. *United States*, 255 F.2d 86, 88 (5th Cir. 1958). The stipulation was properly rejected by petitioner and the government declined to stipulate as to the customs declaration presumably filed in New York City in June, 1974, which the government, through its own neglect, was unable to produce.* The court, however, quashed the entire subpoena, stating that the production of a telex concerning Buhler's customs declaration from Los Angeles was sufficient compliance with the subpoena and the rest of the subpoena was quashed.

The court was in error in quashing petitioner's subpoena that would have produced, in the opinion of petitioner and his counsel, evidence that would have negated the government's proof, a belief that is supported by the subsequent discovery that the witness's Los Angeles cus-

* Petitioner's counsel had informed the court that he had been told by United States Customs, in a telephone conversation, that individuals bringing valuable stones to this country for an appraisal have to file a bond with customs to insure that the duties are paid if the stones are sold while here for examination and appraisal.

toms declaration was prepared by his father and not in December, 1974. *United States* v. *Seeger*, 180 F. Supp. 467 (S.D.N.Y. 1960); *United States* v. *Nixon*, 418 U.S. 683, 711 (1974).

VI.

The Trial Court Erred In Failing To Charge, As Requested, On The Negative Inferences That Can Be Drawn From False Testimony.

Prior to submitting the case to the jury, the petitioner requested that the Court give the following charge:

> "In considering the evidence in this case you must consider the carriage, behavior, bearing manner and appearance of a witness. The words used by a witness are by no means all that we are to rely on in making up our minds about the truth of the matter before us. The jury may and indeed should take into consideration the whole nexus of sense impressions which they get from a witness. Moreover, such evidence as the hearing and manner may well satisfy you not only that the witness's testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance as to give assurance that the witness is fabricating and that if he is, there is no alternative but to assume the truth of what he denies." (A 117)

The court did not charge as requested, either in verbatim or in substance, and this was error. *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952); *United States* v. *Jenkins*, 510 F.2d 495, 499 (2nd Cir. 1975); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2nd Cir. 1973).

Hans Buhler was an incredible witness and was described by the court in the following terms:

> "It is very difficult to perceive with this witness . . . this witness is so completely hopeless that we are not going to have a complete trial unless we have to actually put into evidence parts of these documents . . ."

Buhler, a dealer in jewelry and valuable stones for some seven years, during which time he acted as a broker on the sales of diamonds of over 100 carats worth thousands of dollars, comes to the United States carrying on his person two stones, a 9.88 carat diamond and an 8.35 carat emerald, worth over $200,000 uninsured. Buhler explains the absence of insurance by stating the rates are too high, but admitting that he does not know what the rates are, because he did not make inquiries. Joseph Banda, a member of the Diamond Dealers Club here in New York City, and a dealer in valuable stones, diamonds, emeralds, etc., for the past twelve years, testifies that diamonds worth over a hundred thousand are shipped bank to bank and the rate for insurance coverage is three per cent.

Buhler testifies that when he arrived in Los Angeles in December, 1974, he declared to United States Customs that he was carrying "valuable things" worth $100,000. The government, at the conclusion of the trial, stipulates, over petitioner's objection, that Buhler did not declare either a diamond or an emerald when he arrived in the United States in December, 1974.

Buhler testified that he had bought the diamond from Barth, who he described as one of the biggest jewelers in Zurich. Petitioner's counsel produces his investigator's sworn affidavit in which it states that Barth denies having sold a diamond to Buhler worth over 400,000 Swiss francs.

Buhler states that when the diamond is examined by G.I.A. in New York in July, 1974, it is listed on the color scale with a letter rating of "F", but in December, 1974, the same stone is examined by G.I.A. in Los Angeles and has a color rating of "E". The diamond is photographed in July by G.I.A. but not in December. Buhler pays the cost of the examination in New York in July, 1974, about $130. The examination in Los Angeles in December is paid for by Kalman von Csazy, a friend of Buhler's, at a cost of $30, although Buhler states he is present when the examination is performed.

In Los Angeles in December, 1974, Buhler has with him several thousand dollars in cash, but he needs a friend to pay a thirty dollar bill and has the friend sign the receipt for the stone. Buhler states he wants to have the diamond re-examined, but he does not want to go to New York because they will give him the same certificate. Banda, petitioner's witness, testifies that G.I.A. charges $20 per carat for a full examination and $10 per carat for a reexamination, and that he has submitted diamonds for reexamination. Banda's credentials are reinforced by his testimony that he is currently acting as a broker for a diamond worth over one million dollars. Buhler now has a stone with two certificates and the difference between an "E" and "F" color rating on stones of the same size, weight and dimensions is fifteen per cent, yet Buhler gives the diamond to Kaminsky with both certificates and no explanation as to why there are two certificates for the same stone, since the existence of the "F" color rating would substantially affect the value of the stone, and Buhler never states if he is selling the diamond with an "E" or an "F" color rating.

In selling the diamond to Kaminsky, Buhler is selling it for $195,624 based on multiplying 9.88 by $19,800, realizing a gross profit of approximately $10,624. Buhler admits telling a federal Grand Jury that he sold the diamond to Kaminsky for $19,300 a carat. If in fact

he did sell the diamond for $19,300 a carat, his sale price would be $190,684, or a gross profit of $5,684. Since according to Buhler he has to split the profits with a partner, on a 50-50 basis he would have for himself less than $5,500 after selling the diamond for $19,800 a carat. Buhler testified that he would have to pay a 7% commission from the profits of the sale of the diamond to his broker, Hans Furer, which amounts to approximately $745.00. There is, however, in evidence, an agreement to split a commission on the sale of a 9.8 carat diamond entered into between James Brito, Herbert Sachs' client and Hans Furer, Hans Buhler's broker, on January 1, 1975, calling on them to share equally a commission of $15,000 (A 133). This $15,000 commission is totally at variance with Buhler's testimony and equally unreconcilable with it.

Buhler admits he could have sold the stone for more in Europe, but he sold it in America for a ridiculously small profit to three strangers before he ever saw their money.

Buhler introduces two documents, both in evidence, the "Chaos" guarantee signed by Mari-Ann Danise and the receipt signed by "Harry Levine". Neither signature on either document is linked to the defendant Danise or the petitioner by the independent testimony of an expert in handwriting analysis. The documents depend for their validity solely on the testimony of Buhler. Buhler, moreover, was never able to explain, although the defendant Kaminsky's lawyer devoted the greater portion of his cross-examination to this area, how the petitioner could possibly owe him $255,000 for the diamond and the emerald. The testimony of Buhler was that he sold a diamond to Kaminsky for $195,000 which in turn was sold by Kaminsky to the petitioner for $22,800 a carat, or a total price of $225,264, with the entire $30,000 profit on the resale belonging to Kaminsky, not Buhler. Buhler

then gave Kaminsky an emerald in return for which Kaminsky relinquishes $30,000 that the petitioner owes to him on the sale of the diamond to Buhler. Buhler, having sold both the diamond and the emerald to Kaminsky for $225,000 was entitled to receive only that amount and not $255,000. The sale of the emerald to the petitioner by Kaminsky did not entitle Buhler to a receipt for the emerald nor entitle him to any portion of the price on the sale of the emerald, but Buhler overlooked that in preparing the document.

Buhler's sale of the diamond was the first time he had ever sold a stone in the United States, and he sold it in such haste to three strangers for such an incredibly low profit that a properly instructed jury could well have inferred that the truth was opposite to what Buhler had testified to.

A properly instructed jury could easily have drawn negative inferences from Buhler's testimony, and surely would have drawn such inferences had they been so instructed after listening to the testimony of Barth.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Nos. 540, 541, 544—September Term 1976
Argued December 16, 1976 Decided January 6, 1977
Docket Nos. 76-1404, 76-1412, 76-1419

UNITED STATES OF AMERICA,
Appellee,

—against—

HARRY LEVINE BENSON, HERBERT KAMINSKY and MARI-ANN DANISE,
Defendants-Appellants.

Before MULLIGAN, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeals from judgments of conviction for violations of 18 U.S.C. §§ 371, 1343 and 2314 after a jury trial in the United States District Court for the Southern District of New York, Hon. Charles H. Tenney, *Judge.*

Affirmed.

ALAN LEVINE, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Audrey Strauss, Assistant United States Attorney, of Counsel), for Appellee.

GILBERT EPSTEIN, New York, New York (Stokamer & Epstein, New York, New York), for Defendant-Appellant Benson.

GRETCHEN W. OBERMAN, New York, New York, for Defendant-Appellant Kaminsky.

PHYLIS S. BAMBERGER, New York, New York (William J. Gallagher, Legal Aid Society, New York, New York), for Defendant-Appellant Danise.

Appendix A

MULLIGAN, *Circuit Judge:*

The appellants Herbert Kaminsky and Harry Levine Benson were convicted on June 2, 1976 after a jury trial before the Hon. Charles H. Tenney, United States District Court for the Southern District of New York, on three counts of an indictment charging 1) conspiracy to defraud, 2) the use of a wire communication in interstate and foreign commerce in the execution of the scheme to defraud, and 3) inducing an individual to travel in interstate and foreign commerce in the execution of a scheme to defraud in violation of 18 U.S.C. §§ 371, 1343 and 2314. The defendant Mari-Ann Danise was found guilty on the two substantive counts but the jury was unable to reach a verdict as to her on the conspiracy count. The convictions are affirmed.

The victim of the swindle was one Hans Buhler, a Swiss diamond merchant, who brought to the United States two precious stones, a 9.88 carat diamond and a 8.35 carat emerald which together were valued at more than $200,000. Kaminsky and Danise obtained possession of the diamond from Buhler in New York on the pretext that they wished to have it appraised and shown to a prospective customer. Buhler received in exchange a cash memorandum receipt. The defendant Benson was then introduced to Buhler by Kaminsky as the purported buyer. Buhler thereupon gave the emerald to Kaminsky as a commission for the sale. He never saw either stone again. The defendants through a series of false representations then induced Buhler to make trips to Chicago, London, Zurich, New York and Las Vegas. The well travelled Buhler was unable to recover either the stones or the purchase price and finally realizing that he was the victim of a fraudulent scheme, advised the Federal Bureau of Investigation.

Appendix A

Appellants raise a variety of points on appeal which we consider to be meritless. However, one issue apparently has never been litigated or discussed since there is no reported federal opinion directly in point. Although the indictment named Buhler as the owner of the precious stones and the Government maintained this position throughout the trial, appellants argue that Buhler's claim that he purchased the diamond from a private party through one Werner Barth, a Zurich jeweler, was false and that the court below abused its discretion in failing to grant a continuance during the trial so that Barth's deposition could be obtained in Switzerland. Appellants had interviewed but not deposed Barth in Switzerland and he indicated that he had not sold any 9.88 carat diamond to Buhler. Appellants urge that a conviction under 18 U.S.C. § 2314 cannot be properly obtained unless the Government can establish that the property obtained by the false pretenses of the defendants was lawfully owned by the person defrauded.

Appellants urge that the second paragraph of section 2314 [1] which is here relevant was enacted by Congress in 1956 to protect "honest citizens" and that the Barth deposition would establish that Buhler had no title to the diamond and that he in fact was a jewel thief not

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[1] The relevant paragraph of 18 U.S.C. § 2314 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more. . . .

within the ambit of the statute. The legislative history of the statute depended upon by appellants [2] indicates that Congress was concerned that the victims of confidence men included "retired persons, widows and also business and professional men," but of course Congress was also concerned that "our laws must be kept at a peak level of effectiveness in order to deal with these criminals." It would hardly comport with this congressional concern were we now to exculpate confidence men who prey upon citizens (or even aliens) whose character is suspect. We cannot reasonably or fairly interpret the broad congressional concern for the honest citizen expressed in the House Report cited in footnote 2 to support a congressional intent that others are fair game for the swindler. It is accepted that the prostitute may be raped, the burglar's home burgled, the killer murdered and the thief a victim of larceny. Such a restricted and unusual interpretation of section 2314 as urged by appellants would have to be demonstrated by clear language in the statute itself and there is nothing on its face or in the legislative history to support the strained reading urged upon us. While it is generally held in a civil suit where both parties are guilty of criminal behavior with respect to the cause sued upon, that the court will leave the parties where it finds them and refuse to act as a

[2] Appellants cite the following language from H.R. Rep. No. 2474, reprinted in 1956 U.S. Code Cong. and Admin. News 3036, 3038:

> Each year many of our citizens are cheated by confidence men. As observed in the Attorney General's communication to the Congress, in many instances the targets of these unscrupulous criminals have been retired persons, widows and also business and professional men. These people lose large sums of money to this group of criminals. The committee is of the firm conviction that our laws must be kept at a peak level of effectiveness in order to deal with these criminals, and protect honest citizens from their operations.

referee among thieves, a criminal action is on a manifestly different footing. Buhler is not the plaintiff here. The United States has brought a criminal proceeding against defendants alleged to have engaged in a crude swindle which induced Buhler to travel in interstate and foreign commerce. Buhler's guillibility or his own criminal background is not relevant to the inquiry as to whether the defendants were properly convicted under section 2314.

Appellants only authority for this position, aside from the legislative history which we have recited, consists of two ancient New York cases, *McCord* v. *People*, 46 N.Y. 470 (1871) and *People* v. *Tompkins*, 186 N.Y. 413 (1906), both of which involved victims of confidence men who were induced to part with property in exchange for the performance of an illegal act. These cases are not in point since Buhler parted with the diamond expecting it to be appraised and shown to a bona fide customer. He surrendered the emerald to pay a commission for what he was led to believe was a lawful sale. In any event, in *Tompkins* the court reluctantly followed *McCord* indicating that at least 12 other states had rejected the narrow New York view which even then was too restricted to permit the practical administration of criminal justice. *People* v. *Tompkins*, *supra*, 186 N.Y. at 416.

Appellants also argue that under these cases and generally in the states, a defendant could not be properly convicted of the crime of obtaining property by false pretenses unless the victim was persuaded to part with title to the goods. If he was merely deprived of possession, he could only be properly charged with the common law crime of larceny by trick.[3] Since it is claimed that

[3] *People* v. *Barnett*, 31 Cal. App. 2d 173, 88 P. 2d 172 (Dist. Ct. App. 1939); *People* v. *Noblett*, 244 N.Y. 355, 155 N.E. 670 (1927); *Whitmore* v. *State*, 238 Wis. 79, 298 N.W. 194 (1941).

Buhler did not have title to the jewels, appellants urge that he could not be properly convicted under section 2314. The appellants are correct in their appraisal of the common law distinctions which did exist among the various types of theft. However, their reliance on them today is without any justification.

The states generally have abolished the distinctions which had existed among the crimes of obtaining property by false pretenses, larceny by trick, embezzlement and larceny by trespass. These distinctions which bedeviled prosecutors, law students and even law professors have long since disappeared. See generally Fletcher, The Metamorphosis of Larceny, 89 Harv. L. Rev. 469 (1976); Goodhart, The Obsolescent Law of Larceny, 16 Wash. & Lee L. Rev. 42 (1959). In New York the distinctions have been obsolete since 1942.[4] They are similarly extinct in federal jurisprudence.

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[4] The addition of § 1290 to the former New York Penal Law in 1942 eliminated the common law distinction among the various forms of theft by the following definition of larceny:

> A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

The section eliminated the defense that:

> 2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property . . . .

The Historical Note, Laws 1942, ch. 732, § 1, makes this legislative intent clear:

[Footnote continued on following page]

In *Morissette* v. *United States*, 342 U.S. 246, 272-73 (1952), Mr. Justice Jackson extensively reviewed the underlying federal larceny statutes codified in 18 U.S.C. § 641. After noting that the states had generally abolished the distinctions among the various types of theft, he concluded that "[t]he purpose which we here attribute to Congress parallels that of codifiers of common law in England and in the States and demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses." (footnotes omitted).

Again in *United States* v. *Turley*, 352 U.S. 407, 412-13 (1957), the Court gave a broad construction to the term "stolen" in the National Motor Vehicle Theft Act (18 U.S.C. § 2312) and rejected the view of those circuit courts which would have limited the term to common law larceny.

More directly in point is *Lyda* v. *United States*, 279 F.2d 461 (5th Cir. 1960), where the court was called upon to construe the first paragraph of 18 U.S.C. § 2314.[5]

> It is hereby declared as the public policy of the state that the best interests of the people of the state will be served, and confusion and injustice avoided, by eliminating and abolishing the distinctions which have hitherto differentiated one sort of theft from another, each of which, under section twelve hundred and ninety of the penal law, was denominated a larceny, to wit: common law larceny by asportation, common law larceny by trick and device, obtaining property by false pretenses, and embezzlement.

See New York Penal Law § 155.05.

[5] The first paragraph of § 2314 provides:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud. . . .

The defendant urged that the term "stolen" goods should be interpreted restrictively to cover only a case where the taking of the property was unlawful (common law larceny by trespass) and not one where the property was surrendered to the defendants who later converted it (embezzlement). The court rejected the argument, relying in part upon Mr. Justice Stewart's opinion in *Bergman* v. *United States*, 253 F.2d 933, 935 (6th Cir. 1958), where the then Circuit Court Judge held, "The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in the statutes is not to be decided upon the basis of technical common law definitions."

In *Lyda* Judge Brown, while holding that the phrase "converted or taken by fraud" in section 2314 need not be interpreted under the facts in that case, nonetheless observed, 279 F.2d at 464:

> The aim of the statute is, of course, to prohibit the use of interstate transportation facilities for goods having certain unlawful qualities. This reflects a congressional purpose to reach all ways by which an owner is wrongfully deprived of the use or benefits of the use of his property. It was one way to meet the difficulties in legislative draftsmanship. The experience with this Act, the Dyer Act, and others bears witness that "what has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches." *Morissette* v. *United States*, 1952, 342 U.S. 246, at page 271, 72 S.Ct. 240, at page 254, 96 L.Ed. 288, at pages 304-305. Congress by the use of broad

> terms was trying to make clear that if a person was deprived of his property by unlawful means amounting to a forcible taking or a taking without his permission, by false pretense, by fraud, swindling, or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime. Since the aim of Congress was to reach all such deprivations, it would distort that purpose if by a sort of reverse process the transaction under review had to consider whether the property was stolen *or* converted *or* taken by fraud. The contiguous presence of all three descriptives lends meaning to each.

In light of these holdings, it is evident that section 2314 cannot be properly interpreted to limit its application to the ancient statutory crime of obtaining property by false pretenses.

Secondly, the language of section 2314 here relevant itself simply condemns the inducing of "any person to travel in . . . interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more." There is no language in the paragraph which requires that the victim actually be deprived of any property at all —the scheme or artifice need only induce the travel not the loot. Hence the statute cannot be truly analogous to either common law larceny by trick or obtaining property by false pretenses. Buhler's title to the gems thus becomes irrelevant. While proof of his surrender of them to the defendants assists the Government in establishing the scheme and intent of the defendants, the loss of property is not part of the corpus delicti of the crime in

paragraph 2 of section 2314. Hence, the Government's consistent position that Buhler actually owned the gems was not necessary to its case and actually created the diversion which prompted this appeal.

This construction of section 2314 is consistent with our prior interpretation of the mail fraud statute, 18 U.S.C. § 1341. In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970), we held that no proof that the victim of the swindle was actually defrauded or suffered any loss was necessary. The close relationship between the mail fraud statute and the second paragraph of section 2314 has been made clear by Congress.[6] The wire fraud statute, 18 U.S.C. § 1343, has also been construed to require no proof that the intended victim was actually defrauded or suffered loss. "To hold otherwise would lead to the illogical result that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim." *United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976).

Appellants argue that Barth's testimony, as well as other evidence which might establish that his title to the gems was suspect, should have been admitted below in

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[6] H.R. Rep. No. 2474, 1956 U.S. Code Cong. and Admin. News 3036, 3038 states the intent of Congress to fill the interstices left by the mail fraud statute with the second paragraph of § 2314 in the following language:

> In combating this sort of criminal activity, the Department of Justice has found that our present Federal laws are inadequate when it comes to dealing with the criminal who utilizes travel by the victim in the perpetration of the scheme to defraud that individual of his money. Such criminals avoid prosecution under the mail fraud statutes (sec. 1341 U.S.C., title 18) by not using the mails. . . .
>
> This proposed legislation is intended to remedy this present lack in the law. . . .

any event to impeach Buhler's credibility. We cannot agree. Aside from the fact that the United States Attorney has represented that a phone call to Barth indicated that he would not speak about the matter and wanted to have nothing to do with it, Buhler's credibility was very much in issue. The Government stipulated on trial that Buhler had not declared the gems upon his entry to the United States. Buhler's extensive criminal record including two convictions for embezzlement in Switzerland was placed before the jury. The defendants argued to the jury that he was a smuggler and a jewel thief. Obviously the jury found that he was the victim of a swindle and we find no abuse of discretion below in either denying the continuance or in refusing to admit other collateral cumulative material reflecting on his credibility. *United States* v. *Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), cert. denied, 416 U.S. 940 (1974).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of March , one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

76-1404

76-1412

76-1419

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

HARRY LEVINE BENSON, HERBERT KAMINSKY,
MARI-ANN DANISE,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Harry Levine Benson,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ DANIEL FUSARO
DANIEL FUSARO
Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-807

HARRY LEVINE BENSON,
Petitioner,

—v.—

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 3, 1977.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 5th day of April, 1977.